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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, ET AL.,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

SUPPLEMENTAL STATEMENT OF FACT.

At page 4 of appellee's brief it is said that

> "the federal courts take judicial notice of Interstate Commerce Commission reports, orders and publications",

authorities to that effect being cited.

The defendants deem it appropriate to state in this reply brief a fact pertinent to the history of the order in ques-

tion which was not available at the time that appellants' original brief was filed.

On January 7, 1943, the Interstate Commerce Commission, upon the application of Honorable James Francis Byrnes, Director of Economic Stabilization, and of the Office of Price Administration, entered an order reopening the proceedings in the matter of *Ex Parte* 148.

Brief Introductory Observations.

Although appellee's argument is distributed under eight points, it appears that its substance is addressed to the following cardinal propositions:

First. Appellee argues that the Interstate Commerce Commission was invested with jurisdiction to enter the order in question.

Second. Appellee argues that the order is not void for want of sufficient findings of fact. This contention rests upon two independent subsidiary contentions:

I. Appellee argues that because the order is general and nationwide in scope, it is so far "legislative" in character that it is exempt from the requirement of due process that administrative orders must be supported by specific findings.

II. Appellee argues that in any event, the order contains sufficient findings to support it.

Third. Appellee argues that appellants may not attack the order in question in the present proceedings but should have resorted to an independent suit in equity to enjoin its enforcement.

Fourth. Appellee argues that the proper intent and construction of the order is such as to entitle appellee to collect the fares in question without the sanction or approval of the Illinois Commerce Commission.

Fifth. Appellee argues that, apart from any question of the validity or proper meaning and effect of the order, the complaint made a case of unconstitutional confiscation of appellee's property.

The first four of appellee's propositions as above summarized relate to the validity and effect of the Interstate Commerce Commission's order in question and to the propriety of questioning its validity in these proceedings.

The fifth of those propositions undertakes to vindicate the decree appealed from entirely independently of the Interstate Commerce Commission's order.

Appellee's argument that the Interstate Commerce Commission had plenary jurisdiction to order a ten per cent increase in fares, not only as to interstate but as to intrastate commerce, was quite unnecessary. Appellants do not dispute the authority of the Interstate Commerce Commission, deriving from admittedly constitutional acts of Congress, to raise the fares in question. Appellants do contend that the order is of no avail to appellee, not because the commission had no jurisdiction with respect to the rates in question, but because the order is invalid for want of sufficient findings and because it was not the intent of the order peremptorily to authorize the increase in question.

In response to appellee's contention that, wholly apart from the action of the Interstate Commerce Commission, the complaint must be sustained as making a case of confiscation, appellants will demonstrate that the complaint, notwithstanding its charge in general terms that the rates sought to be enjoined were confiscatory, cannot seriously have been conceived upon grounds independent of the Interstate Commerce Commission's order.

Although the complaint does undertake to charge inadequate earnings, it not only totally fails to apprise the court of any adequate factual basis for such a charge, but totally omits to plead the content or substance of the evidence before the Illinois Commerce Commission. The defendants will argue that even if the complaint had properly charged facts showing that its rates were so unreasonably low as to be inadequate, it must necessarily show proof of those facts before the Illinois Commerce Commission.

I.

The order in question is invalid for want of sufficient findings of fact.

Before we reply to the contentions advanced in the plaintiff's brief, we deem it is most important to distinguish very sharply between two entirely distinct premises implicit in the plaintiff's argument but not clearly differentiated in the structure of his brief. These two completely separate propositions may thus be stated:

First: That the "legislative character" of the order in question **exempts** it from the requirement of due process of law that administrative orders must be supported by specific findings.

Second: That the order, together with recitals in the report of March 2, 1942, **contains findings sufficient to support its provisions.**

In other words, the plaintiff really contends, *first*, that because the order is legislative in its nature and effect, it **need not** contain or refer to findings of fact, and *second*, that in any event, it **does** contain adequate findings.

In reply to these separate contentions, respectively, the defendants expect briefly but conclusively to demonstrate in this brief:

First: That under the applicable decisions of the Supreme Court of the United States, the "legislative character" of the order does **not** dispense with the constitutional requirement of findings in administrative orders, as such findings are distinct from pronouncements of conclusions; and

Second: That notwithstanding the plaintiff's argument to the contrary, the recitals in the instant order, even when supplemented by the matter in the report of March 2, 1942, do **not** in substance or principle comply with this requirement.

(i)

The legislative character of the order in question did not and could not dispense with the constitutional requirement that orders affecting property rights must be supported by findings of fact.

The plaintiff's first argument is, in its essential substance, that because orders of the kind here involved are frequently and, in the sense intended, correctly referred to as "legislative" in character, such orders need not embody specific findings of fact. As we shall point out a little later in this brief, an examination of the very cases relied upon by the plaintiff, as well as the consideration of other pertinent decisions, makes it clear that, directly contrary to the argument in support of which plaintiff's cases are cited, the rule is that "legislative" powers can constitutionally be delegated to administrative agencies **only upon the condition that the agency find and recite the factual basis for the exercise of the delegated powers**; and that the facts must not only be found, but recited, in order to impart validity to "legislative" commands of executive agencies. But before considering the applicable authorities, the defendants wish to make the following important preliminary observations:

The plaintiff is quite correct in contending that since the transportation act of 1920, the Commission may—and obviously must—base its general orders upon a broad view of the general situation of the carriers against a perspective of the national economy. The Commission need not and, indeed, cannot find or make a "reasonable rate" for each carrier in the country as to each commodity transported or each passenger service rendered between each point of origin and destination. The Commission may and perhaps must predicate its general order, comprehensive in scope, upon a "law of averages" and upon common, ordinary, or generally prevailing conditions, reserving juris-

diction to correct by appropriate specific orders particular inequalities as to particular rates. (The *New England Divisions* case, 261 U. S. 184.)

Now, as we shall show by the authorities, this merely means that the Commission may find facts as to general, common or average conditions. But, as the cases indicate, it does **not** mean that conclusions may be substituted for facts, **even if the facts themselves are those of an average, general or common situation.** In other words, the Commission might, indeed, find the general or average proportion of passengers to freight traffic and the general or average proportion of expense of labor, other operating costs, depreciation, capital expenditure and other factors attributable to different kinds or classes of service; frankly recognizing the possibility or even the certainty of individual hardship and reserving jurisdiction to correct such hardship by specific order.

But the basis of a rate schedule, even if generalized by averages, is none the less a **factual** basis. If, for example, such specific items as labor cost, the cost of maintenance, depreciation, and the like have increased by, let us say, ten per cent on the average, that increase is as much a fact as would be the increase in cost of a particular haul by a particular carrier.

The **facts**—even if they are "**average**" facts—should be found; and a mere pronouncement that rates are "reasonable", "fair", or "just", or that they are

> "necessary to enable petitioners to continue to render adequate and efficient railway transportation service"

or that

> "the passenger service justly and reasonably should contribute to meeting the added operating cost of the railroad."

is a conclusion, whether these opinionative terms are applied to a single rate or to all of the rates in the country.

A case cited by the plaintiff in support of its contention

that orders "legislative" in character need not be supported by specific findings, but actually directly hostile to that contention, is *St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38. That case is a leading one upon the "legislative character" of administrative orders fixing rates. It is pointed out in no uncertain terms that where Congress directly and immediately enacts a command, such as the establishment of a rate schedule,

"its determinations are conclusive";

but the case further holds, no less clearly, that Congress may delegate legislative powers **only provided that the exercise of such power is conditioned upon an administrative finding of facts.**

The court said at page 51:

> "When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, **provided the requirements of due process which are specially applicable to such an agency are met,** as in according a fair hearing and acting upon evidence and not arbitrarily. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *Virginia Ry. Co.* v. *United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead* v. *United States*, *supra*, p. 444; *Florida* v. *United States*, 292 U. S. 1, 12." (Emphasis supplied.)

Incidentally, it is interesting to contrast the findings in that case with those in the present case. The court said at page 46:

> "The findings are elaborate. They include detailed findings with respect to the services rendered by appellant and its rates, the used and useful character of appellant's property, the valuation of used and useful land, the value of appellant's structures on the basis of cost of reproduction new less depreciation, work-

ing capital, going concern value, fair value on the basis of the facts found, fair rate of return, reasonable operating expenses (including repairs, depreciation and taxes), necessary revenue and volume of business."

No such recitals are to be found in the present order.

At page 15 of the plaintiff's brief, counsel cite the following case in a footnote:

Texas & Pac. Ry. v. *Gulf, Etc., Ry.* 270 U. S. 266, 277.

This case merely held, in the language of plaintiff's brief,

"that preservation of 'earning capacity' of the carriers has * * * become 'a matter of national concern.'"

Of course the rate structure of the nation's transportation utilities is "a matter of national concern." It is because of this "national concern" that the Interstate Commerce Commission was created. "National concern" does not mean concern for the carriers alone. It means concern for industry, for the traveling public, and for the nation as a whole, for whose service the carriers exist and who are required to bear the financial burden of that service.

To maintain such service the carrying rates, both interstate and intrastate, must be adequate; but the adequacy of the rates must be ascertained from a **factual** basis. Such rates must be equitably proportioned among the classes of traffic; and equitable proportion requires a determination of facts.

We agree with the declaration by the courts that the matter is one of "national concern". The gravity of that concern requires that the principles of due process of law be scrupulously observed. Such "national concern" should and must be manifested by the Interstate Commerce Commission; and it should and must be so manifested in the form of full and explicit findings of the facts.

The plaintiff attempts to distinguish the following cases cited by the defendants in their original brief:

State of Florida v. *U. S.*, 282 U. S. 194.

U. S. v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.

Atchison Ry. Co. v. *U. S.*, 295 U. S. 193.

The basis upon which the plaintiff undertakes to discriminate these cases from the instant case is that in the cases cited the orders in question were not general orders, national in scope. But no authority cited by the plaintiff and no sound reason advanced in his brief suggests that although the Commission may not increase a particular rate without making findings, it may impose upon the traveling public a blanket ten per cent increase in passenger fares effective throughout the country with only such generalities and conclusions as pronounce the new rate "necessary", "fair", "just", or "reasonable". As the cases cited above hold, these adjectives merely sum up the Commission's opinion or conclusion. No facts are stated to support the above conclusions and, as has been pointed out (*Defendant's Original Brief*, Point I, pages 16-23), the courts have repeatedly held that such findings are insufficient to support an order of the character in question here.

Nothing whatever is gained by the plaintiff's statement that the proceeding in which this order was entered was a "revenue case, not a rate case". Neither authority nor reason suggests that the character of the proceeding as a "revenue case" excuses the Commission from making findings of fact.

We have carefully examined each of the authorities cited by the plaintiff in his brief. Not one of them declares, either directly or by intimation, either by way of holding or by way of *dictum*, that the Interstate Commerce Commission may exercise "legislative" faculties in ordering a general increase in rates without making adequate findings.

On the contrary, in the case of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, cited by the defendants in their original brief, the order in question was promulgated by the President and was intended to effectuate a policy national in scope, having for its object the vitally important conservation of oil and petroleum products. So far as the generality of the purpose of this order was concerned, the order there was similar to the order here. Yet the Supreme Court denounced the order as unconstitutional for want of sufficient findings.

The defendants therefore submit that the plaintiff's arguments are not sufficient to sustain the premise that an order, even though "legislative" in character and general in nature, is valid when not supported by sufficient findings of fact.

(ii)

The recitals in the present order and in the supplementary report are insufficient to sustain the order.

Under the previous point it was urged, and, we believe, clearly shown that there is nothing in the nature or character of the present order to exempt it from the constitutional requirement that it be supported by sufficient findings. Under the present point we shall briefly urge that in spite of the arguments of the plaintiff to the contrary, the findings embodied in the order, even when supplemented by the matter incorporated in the report of March 2, 1942, are totally inadequate.

In the defendants' original brief it was pointed out that mere pronoucements that rates are "reasonable" or "unreasonable", "fair" or "unfair", "just" or "unjust", or "necessary" or "unnecessary", are insufficient. (*State of Florida* v. *U. S.*, 282 U. S. 194, *Defendants' Original Brief*, pages 14-15; *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, *Defendants' Original Brief*, pages 16-23.)

No case cited by the plaintiff holds to the contrary, either in general terms or in terms specifically applicable to orders of the kind involved here.

At pages 7 to 12 of his brief, the plaintiff seeks to integrate the present order with the Commission's 1925 order (Exhibit A attached to the complaint) and its 1936 order (Exhibit 3 introduced at the preliminary hearing), and to derive from the findings embodied in those orders support for the present order. A moment's reflection will clearly demonstrate the fallacy of this argument.

We assume (without conceding) that the 1925 and 1936 orders were based upon sufficient recitals of fact. But manifestly those facts justified those orders—not the present order. Recitals findings that one state of facts existed in 1925 and that another state of facts existed in 1936 do not amount to findings that a **different** state of facts exists in 1942.

The defendants do not contend that the present order may not properly refer to previous orders as bearing upon the situation of the carriers at the time that those orders were entered. But clearly, those findings justify the rates fixed years ago—**not** a change in those rates. We shall not further protract our argument that findings made over sixteen years ago and over five years ago, respectively, justifying a rate schedule at that time, do not and cannot justify a change in that schedule in 1942.

Therefore the defendants contend, as they have argued in their original brief, that the order of January 21, 1942 is invalid for want of sufficient findings of fact.

II.

The present order is subject to collateral attack by the defendants in the present proceeding and upon the present motion.

At various points in his brief, the plaintiff conducts an adroit and skillful argument that the defendants may not in the present proceedings challenge the validity of the order upon which the plaintiff relies. (See *Plaintiff's Brief*, pages 21-29.)

The plaintiff points out that the cases cited by the defendants were injunction proceedings in which it was sought to restrain the enforcement of orders of the Commerce Commission or other agencies. The plaintiff therefore argues that those proceedings constituted "direct attacks". It is our understanding that a "direct attack" is an attack upon an order or judgment in the proceeding in which it is entered or in some continuation thereof, as, for instance, upon a statutory review in the nature of an appeal from a writ of *certiorari* to the Commission or court making the order; and that a collateral attack is an attack in an independent proceeding wherein the order is assailed as absolutely void.

Each of the cases cited by the defendants was an independent equity proceeding and to that extent, at least, similar to the present proceeding. In each of the cases cited by the defendants as holding an order of the Commission or other agency invalid, the court held that the order was unconstitutional, null and void.

In other words, the plaintiff argues that, even if equity would **enjoin** the enforcement of the execution of the present order in a suit brought for that purpose, it will nevertheless enforce and give effect to that order by affirmative injunction at the suit of the plaintiff and that the de-

fendants are precluded from even resisting negatively and by way of defense the effect of the present order because they have not affirmatively asked to have its enforcement enjoined.

The sophistry of this argument is best exposed by a clear statement of the argument itself.

If the defendants' contention that the order is void for want of sufficient findings is correct (*Defendants' Original Brief*, Point I; *This Brief*, Points I and II, *ante*), it would seem to follow necessarily that the plaintiff cannot have the order affirmatively enforced in this proceeding.

The true distinction between those cases in which a state or a utility sues to enjoin an order of the Commission and cases such as the present case is stated by this court in *New York* v. *United States*, 257 U. S. 591, in the very excerpt quoted by counsel for the plaintiff at page 21 of plaintiff's brief.

That distinction, as perceived in the language quoted, is that in a suit asserting the order of the Commission, the court may examine the evidence; but in other proceedings, as the court said, the state authorities are

> "obliged to show that the order was void on the face of the findings **without regard to the evidence.**" (Bold of appellee.)

In this case, the defendants maintain that the order

> "is void on the face of the findings without regard to the evidence."

Thus the case of *New York* v. *U. S.*, cited by the plaintiff, expressly recognizes that the state authorities may **defend** against an order **"void on the face of the findings."**

III.

Notwithstanding appellee's argument to the contrary, the purport of the order was such as merely to approve the increased rate schedule and not such as to relieve the carriers from the necessity of procuring appropriate authority from the states with respect to increased intrastate rates.

The Corporation Counsel of the City of New York, having prevailed in the case of *Transit Commission* v. *Long Island R. Co.*, 33 N. Y. S. (2) 963, the decision in which case has been discussed in the previous briefs in this case, has filed his brief as *amicus curiae* in this court. The considerations and arguments developed in that brief are cogent in reasoning, exhaustive in the compilation and presentation of historical material, and, in our view, excellent in expression. The defendants refer to and adopt those arguments and considerations in reply to the plaintiff's contention that the intent of the order was such as peremptorily to require and authorize the increase in question. It would be a work of supererogation to repeat the substance of the *amicus curiae* brief of the Corporation Counsel.

However, for the immediate convenience of the court, the defendants here state with the conciseness of a summary those considerations which, in their view, should prevail against the plaintiff's construction of the order.

(i)

The order expressly contemplates that application "has been or will be made" to state authorities "for permission to increase similarly petitioners' intrastate rates, fares and charges."

The order recites that

> "similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares and charges; * * *" (R. 32.)

This language is totally and utterly inconsistent with any view that the order, *ex proprio vigore*, authorizes the increase of the rates in question. On the contrary, it inexorably requires the conclusion that with respect to intrasate fares, the carrier must **either** secure the approval of appropriate state authorities **or** have any discrimination corrected by an order under Section 13 with respect to the particular state and the particular carrier or carriers affected by a particular discrimination.

(ii)

The antecedents of the present order refute the plaintiff's construction and support the defendants interpretation of its provisions.

The brief of the *amicus curiae* demonstrates that the orders of the Commerce Commission preterient to and culminating in the instant order are of such tenor as to demonstrate the entirely permissive effect of the order in question.

As indicated in the brief of *amicus curiae*, the previous orders expressly "**required**" changes in rates. The present order equally explicitly "**permits**" such changes.

That brief is likewise convincing upon the argument that the order cannot take effect under Section 13 of the act because it does not purport to correct discrepancies between previously existing intrastate fares and previously established interstate rate structure. It is shown in that brief that the order cannot take effect under the general provisions of the act, particularly under the provisions of Section 15a, because orders under the latter section, although they may be mandatory or permissive as to interstate commerce, cannot operate mandatorily upon intrastate commerce.

(iii)

The extreme generality of the recitals of the present order, even if it did not render the order void, evinces the absence of an intent mandatorily to impose an increase upon all intrastate rates throughout the nation.

The defendants have previously argued that the order in question is void because the findings are insufficient to sustain it against objection on constitutional grounds. (*Appellants' original brief*, Point I; *Appellants' reply brief*, Point I, *ante*.)

However, under the present point, not with respect to the **validity**, but with respect entirely to the **intent and meaning** of the order, the defendants urge that even if the findings in question might be deemed sufficient to sustain the order as valid, they are not of the character that one would expect to find as prefatory to and as constituting the sole basis for an imperative increase in the rail fares of the country during a time of war. Thus, as the New York court pointed out in the *Long Island Railroad case*, the findings might conceivably be consistent with an intent merely to **permit** an increase in rates; but it is inconceivable that the Commerce Commission could have intended to impose a nationwide increase of rates upon recitals so general in terms as those embodied in the present order.

IV.

The plaintiff's complaint cannot be sustained as making a case of confiscation independently of the order of the Interstate Commerce Commission.

The plaintiff seeks to vindicate the equity of his complaint upon the ground that, entirely independently of the order numbered *Ex Parte* 148, the complaint has charged and the defendants, by a motion in the nature of a demurrer, have confessed the confiscatory character of the rates

prevailing previously to the issuance of the temporary injunction in this case.

The defendants' reply to so much of the plaintiff's argument as seeks to sustain the complaint as sounding in the equity of an ordinary confiscation case, quite apart from so much of it as asserts the authority to charge the rates in question because of the Interstate Commerce Commission, can be briefly made.

In the **first** place: "Even if it be granted, for the sake of argument, that the complaint properly charges that rates are so low as to be confiscatory, **the complaint is absolutely destitute of any allegation that any such showing was made to the Illinois Commerce Commission.**"

The function of a federal court of equity in a confiscation case is too well settled to require elaborate consideration. The logic upon which a chancellor supersedes an order fixing a confiscatory rate is that, **the commission having acted arbitrarily and unreasonably and its order being without substantial support in the evidence before the commission,** the plaintiff utility will be deprived of its property without due process of law unless enforcement of the commission's order be enjoined.

Courts of equity will not make any rates for utilities, nor will they protect a rate already instituted or sought to be instituted by the utility, unless the utility can not obtain a recognition of its constitutional rights before the commission.

It is very clear that a court can not say that a commission acted arbitrarily or unreasonably unless at least the substance of the evidence before the commission is pleaded in the complaint and thus made accessible to the court.

This court's recognition of the principles above set forth is clearly expressed in two cases, both cited by the plaintiff in an attempt to sustain the validity of the order of the Interstate Commerce Commission but actually pertinent

in the present aspect of the case. These two cases are this court's companion decisions, the case of *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, and *New York* v. *United States*, id. 591. In the first of these cases, the defendants, the state authorities of Wisconsin, assailed the order upon the ground that it was invalid

> "upon the face of the findings and without regard to the evidence." (p. 600.)

In the second case, the State of New York filed a complaint to enjoin the enforcement of the order. In the first of these cases the evidence before the commission was not before the court. In the second case, that evidence **was before** the court. The importance of the distinction was noted by the court in the *New York* case (at page 600) in the very language cited by the plaintiff at page 21 of his brief. The court said:

> "The defense of the state authorities was a collateral attack upon the order, to prevail in which, **they were obliged to show that the order was void on the face of the findings without regard to the evidence of the absence of it.**"

Similarly, if the order of the Illinois Commission is to be condemned as confiscatory in the instant case, it must be condemned **on the face of the order and without regard to the evidence**, since the substance of the commission's evidence was not before the district court and is not before this court.

But the plaintiff nowhere assails the order of the Illinois Commission as void on its face. The plaintiff does indeed allege that it sustains an operating loss; **but it totally fails to allege that it charged and established the fact of that loss before the commission.** A utility must exhaust its administrative relief before resorting to the equity jurisdiction of the federal courts. *Natural Gas Pipe Line Co.* v. *Slattery*, 302 U. S. 300; *U. S.* v. *Illinois C. R. R. Co.*, 291 U. S. 457; *Prentice* v. *Atlantic Post Line*, 211 U. S. 210.

In the **second** place: The charge that the intrastate

passenger service sustains an operating loss was not made in terms sufficient to support the present injunction. The only language in the plaintiff's entire complaint which even purports to charge confiscation is the language of Paragraph XIV (R. 14), approximately a printed page and a quarter in length.

It is clear that the charges made in this paragraph do not demonstrate the fact of confiscation. Although, in the case of a one-man business or other small concern, the question of annual profit or loss might be purely one of fact, so that an averment, categorical in terms, that such a business had suffered a loss of a thousand dollars might be issuable pleading, the question sought to be litigated upon the plaintiff's complaint was whether the **suburban passenger branch** of an interstate railroad had operated at a profit or a loss.

Clearly, any pronouncement upon that question would involve determinations both of law and of fact. Such an interstate carrier necessarily uses such facilities as tracks, passenger stations, switching apparatus, road beds, and some equipment in interstate suburban passenger service, in interstate and intrastate passenger service and in freight service. Similarly, many charges for the services of employees—such as officers, directors, counsel, watchmen at crossings, the personnel of passenger stations, and the like must be apportioned among several classes of service. The basis of such apportionment is matter of law. A mere averment that a particular branch of a service "operates as a loss" states a mere conclusion; for there is no showing of the **factual** basis upon which one must predicate the **legal** conclusion that charges are properly allocated to that branch. The valuation of the total property is matter of law and fact. No basis of valuation is shown; and the court could not say which of various formulas of valuation is embodied in the plaintiff's averment of value.

The plaintiff, by asserting that it sustained an operat-

ing loss, without the slightest intimation as to how it computed such loss, sought to confront the defendants with a conclusion of the utmost generality. Of course, a motion in the nature of a demurrer admits only facts well pleaded. The complaint in the instant case discharged the dual office of a pleading, that is, of an instrument tendering issues of fact, and of a sworn application for interlocutory relief by temporary injunction. If the defendants were compelled, in challenging the sufficiency of the complaint, to admit so general a conclusion as that of operating loss, with no supporting averments of fact, at the peril of having litigation protracted for months or years while the basis for that conclusion was developed in the event that the defendants should elect to answer rather than to demur, then equity pleading would become an instrument of oppression.

It is therefore respectfully submitted that the charge of operating loss was a mere conclusion, hence was not well pleaded, therefore was not admitted and consequently is not sufficient to sustain the equity of the complaint upon an issue of confiscation.

Conclusion.

For the reasons submitted in the plaintiff's original brief and in the plaintiff's reply brief, as well as for the reasons set forth in the *amicus curiae* brief, the defendants respectfully submit that the decree of the district court was erroneous and should be reversed.

Respectfully submitted,

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